No. 95-1595

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Supreme Court of the United States
OCTOBER TERM, 1995

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
MARVIN K. YOUPEE, SR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE ALLOTTEES ASSOCIATION AND AFFILIATED TRIBES AND BANDS OF THE QUINAULT RESERVATION, INDIAN LAND WORKING GROUP, NAVAJO LANDOWNERS RIGHTS PROJECT, INC., OGLALA SIOUX TRIBE, QUILEUTE TRIBE, SAN XAVIER DISTRICT COUNCIL, SAN XAVIER ALLOTTEES ASSOCIATION, and SAN XAVIER COOPERATIVE ASSOCIATION IN SUPPORT OF RESPONDENTS

JOEL JASFERSE
Counsel of Record
509 Zecca Drive
Gallup, NM 87301
(505) 722-4417

LEVON B. HENRY
NAVAJO LANDOWNERS RIGHTS PROJECT, INC.
P.O. Box 2104
Crownpoint, NM 87313
(505) 786-7207

KENNETH BOBROFF
DNA-PEOPLE'S LEGAL SERVICES, INC.
P.O. Box 116
Crownpoint, NM 87313
(505) 786-5277

THOMAS E. LUEBBEN
LAW OFFICE OF THOMAS E. LUEBBEN
211 12th Street NW
Albuquerque, NM 87102
(505) 842-8128
Counsel for San Xavier District Council, San Xavier Allottees Association, and San Xavier Cooperative Association

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INTEREST OF *AMICI* [1]

Amici are tribes and organizations of allotment landowners concerned with the effects of the Indian Land Consolidation Act (ILCA) on their members. *Amici's* specific concern is with the escheat provision of the ILCA and its devastating effect on individual landowners. *Amici* urge that the escheat provision be declared unconstitutional under the Fifth Amendment to the U.S. Constitution.

ALLOTTEES ASSOCIATION AND AFFILIATED TRIBES AND BANDS OF THE QUINAULT RESERVATION (AA&AT) is an organization of individual Indians owning interests in trust allotments on the Quinault Reservation, their heirs, and tribes whose members were originally allotted on the Quinault Reservation. The affiliated tribes are the Chehalis, Chinook, Cowlitz, Hoh, Ozette, Shoalwater, Queets, Quileute, and Quinault. A purpose of AA&AT is to protect treaty rights and maintain the trust relationship with the United States government. AA&AT is governed by a Board of Directors, consisting of 15 members selected at large from among trust land owners plus one representative from each tribe. The Quinault Reservation was allotted into 2,430 eighty-acre allotments. There are approximately 3,500 owners of trust land; heirs may number twice that amount.

INDIAN LAND WORKING GROUP is a national inter-tribal organization comprised of tribal representatives, allottee associations, and individual landowners who are affected by problems related to allotted and fractionated Indian trust land. The Indian Land Working Group seeks to identify and resolve these problems through activities such as annual Indian Land Consolidation Conferences, educational workshops, and legal and policy related initiatives.

NAVAJO LANDOWNERS RIGHTS PROJECT, INC. is a non-profit organization incorporated under the laws

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[1] Counsel for Petitioner and Counsel for Respondent both consent to the filing of the Brief of *Amici*. Their letters are submitted for filing herewith.

of the Navajo Nation. It works to increase the ability of individual Navajo allotment landowners and their families to use and protect their land for future generations. NLRP, Inc. is governed by a board of allotment landowners and family members. The Navajo Nation includes over 4,000 allotments with approximately 25,000 owners. NLRP, Inc. uses educational, community, public policy, and legal strategies to assist landowners in gaining control of their land.

OGLALA SIOUX TRIBE of the Pine Ridge Indian Reservation of South Dakota has 32,000 enrolled members, 18,000 of whom reside within the exterior boundaries of the reservation. The Pine Ridge Indian Reservation contains approximately 1,065,966 acres of allotted lands. The vast majority of this land has multiple owners. The Oglala Sioux Tribe is concerned that its landowners lack the necessary information and assistance from the Bureau of Indian Affairs to effectively protect their land interests from the effect of the Indian Land Consolidation Act's Section 207.

QUILEUTE TRIBE is a federally recognized tribe of about 700 members whose ancestors signed the Treaty of Olympia. Pursuant to that treaty, tribal members were allotted timber land on the Quinault Reservation. Under the Indian Land Consolidation Act valuable lands of Quileute tribal members escheat to the Quinault Indian Tribe.

SAN XAVIER DISTRICT COUNCIL, SAN XAVIER ALLOTTEES ASSOCIATION and SAN XAVIER COOPERATIVE ASSOCIATION are part of and members of the Tohono O'odham Indian Nation, a federally recognized Indian Tribe located in southern Arizona. The San Xavier District Council is the official governing body of the San Xavier District, a political subdivision of the Nation. The San Xavier Allottees' Association and the San Xavier Cooperative Assocation are non-profit corporations consisting of individual owners of allotted trust lands. There are approximately 1,300 individual owners of fractional interests in allotted trust lands within the San

Xavier Reservation. Because the majority of the lands (60%) of the San Xavier Reservation were allotted in trust to individual Indian owners more than a century ago, the San Xavier organizations and their members are severely affected by the escheat provision of the Indian Land Consolidation Act.

SUMMARY OF ARGUMENT

Fractionated allotment ownership is the legacy of choices Congress made in exercising power over Indian lands. By imposing both individual ownership and restraints on alienation, Congress created a system in which Indians who inherited undivided allotment interests have neither legal incentives nor practical means to consolidate ownership. This system has placed a severe, ever-increasing administrative burden on the Bureau of Indian Affairs and prevented the effective use of land in divided ownership. Congress' solution was Section 207 of the Indian Land Consolidation Act which, as amended, all but eliminates landowners' ability to pass to chosen heirs allotment interests smaller than 2% not immediately producing significant income. Congress created the problem of fractionated ownership and Congress' chosen solution benefits primarily the public treasury. Yet its solution, confiscating the long-recognized right to pass property to one's heirs, burdens only individual Indian landowners. The Fifth Amendment requires that such a burden be borne by the public as a whole.

This Court found in *Hodel v. Irving* that the original Section 207 was a taking of property without just compensation. The Court's opinion applied the three-part analysis from *Penn Central Transportation Co. v. New York City*. It noted that the right to pass valuable property to one's heirs is itself a valuable right and that Section 207 allowed the "escheat" of economically valuable property interests. It ruled that the Government's action in Section 207 was extraordinary, since it completely abolished devise and descent of valuable property interests, interests for which *inter vivos* transfers were inadequate as a means of passing to one's heirs.

The amendments to Section 207 were passed three years before the ruling in *Hodel v. Irving* and did little to correct the act's defects. The statute's economic impact remains substantial. By its operation, individual landowners lose the right to pass interests smaller than 2% to chosen heirs even though such interests may produce substantial income over periods longer than the five years from date of death considered under the amended statute. Timber lands, mineral interests, water rights, and land near developing areas all may produce significant income longer than five years from the date of the owners' death. As tenancies in common, small undivided interests provide use rights to the entire parcel. Co-owners can use their property to live on, farm, graze animals, hunt and fish, gather plants and herbs, collect firewood, camp, swim, play, and conduct religious ceremonies. While not earning income, such uses are valuable. Outside the context of Indian allotments, no property available for such substantial and wide ranging uses would be subject to taking without compensation.

Indian allotments also have non-economic value which merits protection under the Fifth Amendment. Despite Petitioner's unsupported speculation that Indians would prefer that their land go to the government (even a tribal government) upon their death, tribes have opposed Section 207 because it deprives their members who own allotments of family, cultural, spiritual, and historical ties to the land and their heritage. Allotment ownership, even when small, represents for many Indians long and unbroken ties to family ancestors and history, to tribal and family identity, and to spiritual and religious responsibilities. Just as compensation is due when government takes an owner's right to exclude strangers, so should it be due when the government takes an Indian landowner's similarly inchoate property interest.

The practical application of Section 207 as amended remains an extraordinary regulation of property. The statute eliminates the right to pass property for anyone incompetent to make a will. It eliminates the right to pass

property to one's chosen heirs unless those heirs happen to be co-owners. It does the same for anyone who stands to inherit an "escheatable" interest in an unfinished probate proceeding. Nothing has changed regarding *inter vivos* transfers since the Court ruled them inadequate as a substitute for devise and descent in *Hodel v. Irving*. Because all transfers, including revocable trusts, must be approved by the Secretary of the Interior (Secretary), and because transfers are subject to laborious, lengthy, and burdensome procedures of the Bureau of Indian Affairs, the right to make a will is essential to the right to pass property to one's chosen heirs. The Secretary and, by delegation, the Bureau of Indian Affairs have the incentive, means, and arguable obligation to disapprove *inter vivos* transfers by landowners seeking to avoid the confiscation caused by Section 207.

Congress chose to address fractionated ownership by taking property owners' right to pass their interests to chosen heirs. That solution is hardly the only available; other plainly constitutional options exist. The Government could compensate affected landowners. It could provide financial resources and assistance to tribes, individuals, and families to consolidate fractionated interests. It could aggressively promote estate planning among owners of divided interests. It could provide adequate information to individuals seeking to consolidate interests themselves and it could simplify the procedures necessary to effect *inter vivos* transfers approved by the Secretary. It could even place *reasonable* conditions on devise and descent of fractionated allotment interests. The Constitution allows many ways for Congress to address the problem of fractionated ownership of Indian lands. It does not allow the Government to eliminate the only practical means landowners have to pass valuable property to their chosen heirs.

ARGUMENT

I. SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT FORCES INDIVIDUAL INDIAN LANDOWNERS TO BEAR A BURDEN WHICH IN FAIRNESS AND JUSTICE SHOULD BE BORNE BY THE PUBLIC AS A WHOLE.

A. The Government created the problems of allotment land ownership, not Indian landowners.

The Federal Government caused fractionated ownership of Indian lands by imposing two policies, individual ownership and severe restrictions on alienation. In the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388, and other statutes, Congress choose to divide many tribes' lands and to convert title from communally held to individually owned.[2] *Felix S. Cohen's Handbook of Federal Indian Law* 131 (1982) (*Cohen*). The Government's stated rationale was the achievement of full Indian participation in the American system.[3] See D.S.

[2] The myth endures that all Indian tribes held property in common before European contact. *Pet. Br.* at 29, n.13. In fact, many tribes have long recognized exclusive individual and family use rights in land. Under Navajo and Pueblo law, families have rights to exclusive use of their own agricultural lands. Joe S. Sando, *Pueblo Nations* 43 (1992); Gary Witherspoon, *Navajo Kinship and Marriage* 74-82 (1975). Navajo law recognizes inheritance of use rights, *In re Estate of Benally v. Denetclaw*, 5 Navajo Rptr. 174 (1987), and requires compensation if such rights are taken by eminent domain. *Dennison v. Tucson Gas & Electric Co.*, 1 Navajo Rptr. 95 (Navajo Ct. App. 1974).

[3] Another rationale for allotment is noted in the minority report on a Dawes Act predecessor: "The main purpose of this bill is not to help the Indians, or solve the Indian problem, or provide a method for getting out of our Indian troubles so much as it is to provide a method for getting at the valuable Indian lands and opening them up to white settlement. . . . When the Indian has got his allotments, the rest of the land is to be put up to the highest bidder, and he is to be surrounded in his allotments with a wall of fire, a cordon of white settlements, which will gradually but surely hem in, circumscribe him, and eventually crowd him out. True, the proceeds of the sale are to be invested for the Indians; but when the Indian is smothered out, as he will be under the operations

Otis, *History of Allotment Policy, reprinted in Readjustment of Indian Affairs: Hearings on H.R. 7902 of the House Comm. On Indian Affairs, 73d Cong., 2d Sess. Pt. 9* (1934). Yet recognizing the vulnerability of new Indian landowners to loss of the land, Congress passed severe restrictions on alienation of individual Indian allotments. While in trust, Indian lands cannot be sold, devised, given, exchanged, or otherwise transferred without the approval of the Secretary of the Interior (Secretary) 25 U.S.C. 379, 404, 464, 483; 25 C.F.R. 152.17. The initial trust period of twenty-five years, subject to residential extension, was extended indefinitely by the Indian Reorganization Act, ch. 576, 48 Stat. 984, 25 U.S.C. 462 *et seq.*, and various Congressional acts and executive orders.[4] See 25 U.S.C. 462, 478-1; 25 C.F.R. Ch.I, Appendix.

As allotments passed through inheritance, they descended as undivided interests. Undivided allotment interests, however, are unlike undivided interests in fee. Owners of undivided fee interests have both incentive and means to consolidate their ownership. They are subject to forced partition by a single co-owner as well as forced sale and division of the proceeds. 4A *Powell on Real Property* ¶ 607[3], at 50-47 (June 1996). Title conveyances, meanwhile, are easily accomplished. By contrast,

of this bill, the investment will revert to the national Treasury, and the Indian, in the long run, will be none the better for it . . ." H.R. Rep. No. 1576, 46th Cong., 2d Sess., at 7-10 (1880). The Dawes Act accomplished this objective: total Indian land holdings fell from 138 million acres in 1887 to 48 million in 1934. Two-thirds of the land actually allotted, 27 million acres, passed out of Indian hands. *Cohen* at 138.

[4] Most land left Indian hands when unallotted reservation acreage was declared "surplus" and opened for white settlement. Most allotments left Indian ownership through operation of the Burke Act of 1906, ch. 2348, 34 Stat. 1015, 1018, 25 U.S.C. 349, which gave the Secretary authority to end the trust period for any allottee he found "competent." Forced fee patents resulted in many Indian allotments going out of trust, often because of fraud. See *Cohen* at 136-138; Francis Paul Prucha, *The Great Father: The United States Government nad the American Indians* 295-305 (1986).

the holder of a divided allotment interest who wants exclusive ownership (or who wants to use the property to produce income and cannot obtain co-owners' agreement) has few practical options. For allotment owners, the Government has made sales, purchases, gifts, and exchanges laborious at best, practicably impossible at worst. A century after the Dawes Act, the Government has left Indian landowners with the worst of both worlds: allotment curtailed the effectiveness of custom and land laws which once mediated family and communal ownership, see *Estate of Wauneka*, 5 Navajo Rptr. 79 (1986), and severe restraints on alienation prevent landowners from acting themselves to address fractionation.

This case is unlike those in which the owners' use of their property causes some harm which justifies government regulation. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (building a skyscraper); *Mugler v. Kansas*, 123 U.S. 623 (1887) (manufacture and sale of intoxicating liquors); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (operating a brickyard); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (operating a gravel pit). Here, the Government's regulation of the property has caused the harm being addressed. Even in recent regulatory cases where just compensation was required, the property owner's chosen use of the property had at least some relationship to the Government's rationale for regulation. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (expansion of store and parking lot): *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (ocean-front residence); *Nolan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (construction of larger house). In the case at bar, Indian landowners are deprived of a valuable right—the right to pass property to one's heirs—simply because the Government has decided that tribal, rather than individual, ownership is preferable. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (adjustment of concentrated property ownership permitted assuming just compensation paid). Indian allotment owners had nothing to do with creating the objectionable ownership scheme, nor have they voluntarily done anything with their property to merit regulation. Yet under Section 207, individual landowners, doing nothing, will have their land forfeited to the tribe upon their death.

B. The principal and immediate benefits of Section 207 flow to the public treasury in administrative efficiency, government economy, and ease of administration by the Bureau of Indian Affairs.

Congress enacted Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2206, to address the difficulties of using fractionated allotted lands. *Hodel v. Irving*, 481 U.S. 704 (1987). But as with the Dawes Act, helping Indians was not Section 207's only purpose.[5] Because Indian allotments are trust property, the federal government, specifically the Bureau of Indian Affairs (BIA), is charged with maintaining ownership records, 25 C.F.R. Part 150, conducting probates, 25 U.S.C. 372, 373, making and administering leases, 25 C.F.R. Parts 162 and 212, and distributing proceeds. See, generally, *To Amend the Indian Land Consolidation Act of 1983: Hearing on H.J. Res. 158 of the Senate Select Committee on Indian Affairs*, 98th Cong., 2d Sess., 7, 11 (1984) (*1984 Senate Hearings*) (Statement of Deputy Assistant Secretary of Indian Affairs). The Government finds the administrative burden extremely heavy and increasing each time an allotment interest is further fractionated. S. Rep. No. 632, 98th Cong., 2d Sess. 4 (1984); *1984 Senate Hearings* 53-56. The General Acounting Office estimates that maintaining ownership records on 12 of the more fractionated reservations costs the BIA $40-50 million per year. Government Accounting Office, *Indian Programs: Profile of Land Ownership at 12 Reservations* 24 (Feb. 1992) (*GAO Study*). The BIA claims that it spent as much as 75% ($33 million) of its realty budget to ad-

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[5] *Amici* do not argue that relieving the Bureau of Indian Affairs' administrative burden is not a legitimate public purpose, but rather that Indian landowners are not the sole, nor even the primary, beneficiaries of Section 207.

minister fractional interests in allotments. *Pet. Br.* at 17, n.7.

In theory, Section 207's benefits to the public fisc begin immediately upon its taking effect. Every time a small interest is transferred to the tribe, the burden of the trust responsibility upon the BIA is supposed to be lightened. As soon as an interest passes to the tribe, the BIA is relieved of the trust obligation to create any further divisions or modifications of title records from the inheritance of that interest, to conduct any further probates of that interest, and to distribute any income earned from that interest to an individual owner or owners. Even theoretical benefits to Indian landowners and tribes, on the other hand, are likely to be deferred and ephemeral. Allotments which include less than 2% ownership interests are likely to have many such interests and less likely to have many large interests. In order for parcels to provide significant economic benefits to the remaining owners or the tribe, their ownership must become consolidated to a significant degree. True benefits, if any, are likely to occur only when interests are all but unified or at least sufficiently consolidated to allow the partition of large parcels into tribal ownership. Because parcels with less than 2% interests tend to have so many owners and because small interests larger than 2% will likely continue to be divided, Indian landowners and tribes can expect to wait many generations before they enjoy any significant benefits from Section 207.

C. The cost of instituting Section 207 should be borne by the public as a whole.

This Court ruled long ago that Congress had the power to govern Indian land ownership. *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911). In exercising that power, Congress has sometimes favored individual ownership, as in the General Allotment Act, and at other times favored tribal ownership, as in the Indian Reorganization Act. While Congress may be free to pursue such oscillations, it should not be free to do so without compensating

owners when it eliminates existing property rights. In trying to remedy the problems caused by the conflict between allotment and restraints on alienation, Congress has imposed upon individual landowners the full cost of its choice. While the benefits of escheat flow primarily to the BIA, to the public treasury, and to tribes, the costs are imposed solely on owners of small interests who are deprived, without compensation, of the right and value of transmitting their land to chosen family members. As the Court said in *Armstrong v. United States*, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. 40, 49 (1960). Section 207 imposes just such a burden.

II. SECTION 207 DESTROYS VALUABLE PROPERTY RIGHTS HELD BY INDIAN ALLOTMENT OWNERS.

A. An Indian landowner's right to pass an allotment interest may have significant economic value regardless of how small the interest or how little immediate income it produces.

This Court recognized in *Hodel v. Irving* that although a parcel's income may be *de minimis*, its value may not be. 481 U.S. at 714. It noted that the original Section 207 caused potentially valuable timber and mineral interests to escheat.[6] *Id.* Nothing in the amended version prevents the same impact. Although the amended statute

[6] As Justice Stevens pointed out in concurrence, Congress' use of the word "escheat" is outside the word's usual meaning. *Hodel v. Irving*, 481 U.S. at 727. An "escheat" at common law refers to what happens when a person dies intestate without lawful heirs. Here, Congress is allocating property between two contending parties, *Id.*, only one of which could qualify as an heir at law. In asserting that Section 207 simply designates a particular heir to inherit, *Pet. Br.* at 29 n.13, Petitioner ignores the fact that the tribe is no more a lawful heir at law that the government of the United States is for every citizen. A more accurate term than "escheat" would be "forfeit."

expands the number of years in which an interest can earn $100 to escape escheat, it does not, in fact, "ensure that only interests that are truly minor" will be forfeited. *Pet. Br.* at 25. The safeguard is a mirage. Many types of interests demonstrate their significant value over periods much longer than five or even ten years. Timber lands often have growth cycles of forty to eighty years, *Portland Audubon Soc. v. Lujan*, 884 F.2d 1233 (9th Cir. 1989) (Pacific Coast second-growth forest).[7] Mineral lands can vary tremendously in income depending upon market cycles, discoveries, and regulatory approvals. See *Amendments to the Indian Land Consolidation Act: Hearings on H.J. Res. 158 of the Senate Select Committee*, 98th Cong., 1st Sess. 27-29 (1983) (Statement by Marvin Sonosky representing Assiniboine and Sioux Tribes of Ft. Peck, Shoshone Business Council, and Standing Rock Sioux Tribal Council); *Draft Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project*, Docket No. 40-8968, U.S. Nuclear Regulatory Commission 1-3 (October 1994) (evaluating application submitted April 25, 1988 for uranium mine including 1440 acres of allotted land). Water rights appurtenant to allotted lands may not generate income until water adjudications are completed, see *Colville Confederated Tribes v. Walton*, 647 F.2d 42, *cert. den.* 454 U.S. 1092 (9th Cir. 1981), or water settlements achieved, see Norman H. Starler and Kenneth G. Maxey, *Equity, Liability and the Salt River Settlement*, in Thomas R. McGuire, et al., ed., *Indian Water in the New West* 126-130 (1993) ($10 million estimated value of past legal claim for water rights to 613 10-acre allotments). Land near urban or other desirable locations may become suitable for development

[7] For example, on the Quinault Reservation, allotments are commonly 80 acres. According to documents the BIA provided to *amicus* Allottees Association and Affiliated Tribes and Bands of the Quinault Reservation, 1996 timber sales of fifty-year timber averaged $6,290.94 per acre. A two per cent interest in an 80 acre allotment would yield an average of $10,065.50, yet the parcel would have no income for 49 years before and 49 years after the harvest.

(and hence earn substantial income) over a period more remote than five years. *Estate of Guadalupe Almanza Conger*, 21 IBIA 244 (1992) (interest in land near Phoenix freeway, worth as much as $100,000 per acre, escheats unless heir overcomes $100 annual income presumption in next five years).

The valuation of property using income alone is not aceptable in an eminent domain proceeding, *Nichols on Eminent Domain*, Vol. 4, § 12B.08[1] at 12B-52 (1993) ("A valuation drived from such information [as annual net profits] is often conjectural and speculative'), nor should it be acceptable in evaluating the economic impact of government action. As long as escheat is based exclusively upon income, with no provision to consider market value, Section 207 cannot ensure that only truly minor interests escheat. See *Hodel v. Irving*, 481 U.S. at 714. Consequently, it cannot ensure that the economic impact of the statute is *de minimus*.

Finally with regard to income, the Court should consider the myriad property interests which do not produce income for their owners: most homes, old family farms, small orchards, an inherited family camp or lakeside cabin. Inheritance of such properties, slight though their income may be, is "itself a valuable right." *Hodel v. Irving*, 481 U.S. at 715. The lack of income would certainly not justify the Government's uncompensated taking of such property in a non-Indian context. The same standard should apply here.

The assumption that an allotment interest of less than 2% is without significant value because of its size is similarly flawed. The General Allotment Act allotted lands in parcels of 40, 80, and 160 acres, 25 U.S.C. 331, but because Congress passed various allotment acts for individual tribes, allotments commonly range in size from as few as 10 acres, *Russ v. Wilkins*, 410 F.Supp. 579 (N.D.C.A.1976) (Covelo Indian Community, Round Valley Reservation) to more than 640 acres. *United States v. Moore*, 161 F. 513 (9th Cir. 1908) (Colville Reservation, Chief Moses band allotments). Two per cent of

a large allotment represents significant acreage—often 12.8, 6.4, or 3.2 acres—and upon partition such interests could be extremely valuable. 25 U.S.C. 483 authorizes the Secretary to consider partition of fractionated allotments upon application of a single owner if it is in the owners' best interests. *Sampson v. Andrus*, 483 F. Supp. 240 (D.S.D. 1980).[8] If the Secretary chose to exercise such discretion and provided adequate assistance and information, even small allotment interests could provide greater income and other value to their owners.

Furthermore, even undivided interests can afford valuable economic benefits to the owners in common. Many Indian landowners use allotments as homesites. In practice, living on a fractionated allotment requires negotiating with co-owners, but such is not impossible. Many Native Americans now live in urban areas, *Statistical Record of Native North Americans*, Table 227 at 420 (1993) (49% of U.S. Indian population was urban in 1980), most of these off the reservation, *GAO Study* at 8 (almost half of tribal members from 12 allotted tribes live off reservation). As a result, not all co-owners compete to use allotments as homesite. In some jurisdictions, the BIA processes one-acre homesite leases to co-owners who obtain agreement from a majority of the allotment ownership. The right to live on a piece of land and the right to obtain a homesite lease are extremely valuable economic rights in themselves.

As Petitioner notes, each owner of a tenancy in common "has the right to use and enjoy the entire property as if he were the sole owner." *Pet. Br.* at 19, citing 4A

[8] Petitioner correctly states that the Secretary's authority to partition trust land was sharply limited by the Indian Reorganization Act in 25 U.S.C. 464. *Pet. Br.* at 23, referencing *Sampson v. Andrus*, 483 F. Supp. 240. However, Petitioner neglects to note that the district court ruled that the limitation was relaxed by the passage of 25 U.S.C. 483 in 1948. 483 F. Supp. at 242-243. That statute gave the Secretary discretionary authority to partition trust land upon application of the owners, interpreted by the district court to require consideration of a single landowner's application. *Id.* at 243.

Powell on Real Property ¶ 603[1], at 50-15 (June 1996). A co-owner is limited in the right to use the property only by the same right in the other co-owners. 4A *Powell on Real Property* ¶ 603[1], at 50-15. A person who lives on land in which he or she shares divided ownership is not liable to co-owners for the value of occupying the land. *Id.* ¶ 603[1][a] at 50-15; 4 *Thompson on Real Property* § 32.07(c) at 85 (each tenant equally entitled to the intangible benefits of ownership). A co-owner, no matter how small the share, has the right to live on the property, farm or graze animals on it (if not unreasonably depleting the soil), hunt, fish, gather plants, gather herbs, gather firewood, camp, swim, play, conduct spiritual ceremonies, or collect rocks. In preventing landowners of less than 2% interests from passing on the right to use their allotment to a child or other chosen heir, Section 207 confiscates a valuable right from the owners themselves and inflicts significant economic harm.

B. An Indian landowner's right to pass an allotment interest to chosen family members is valuable for non-economic reasons.

When the Court decided that the original Section 207 violated the Takings Clause, it used the factors identified in *Penn Central* as having "particular significance" in determining when compensation is due. *Hodel v. Irving*, 481 U.S. at 714, quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), in turn citing *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124. While oft-repeated, those factors have not transformed themselves into a "set formula" that can be applied mechanically to determine when "justice and fairness" require compensation. Rather, the inquiry remains "essentially ad hoc, [and] factual." *Id.; Lucas v. South Carolina Coastal Council*, 112 S.Ct. At 2893. The Court has not held the *Penn Central* factors to be exhaustive. Other factors deserve consideration to the extent that they illuminate the effect and character of the government's action.

Indeed, the Court has recognized that non-economic interests in land merit protection and compensation when

they are taken. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2895, n. 8, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (interest in excluding strangers from one's land). The rights to picnic, swim, camp, and live on the land in a movable trailer have been cited as having value even if the right to build on a property was completely eliminated. *Lucas*, 112 S.Ct. at 2908 (Blackmun, J., dissenting). Various state courts have recognized the value of land available only for recreation or camping, *ibid.*, citing *Turnpike Realty Co. v. Dedham*, 284 N.E.2d 891 (Mass. 1982), cert. denied, 409 U.S. 1108 (1973); *Turner v. County of Del Norte*, 101 Cal.Rptr. 93 (1972); *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987).

In judging Section 207's impact on allotment owners, both the Government in its brief and the Court in *Hodel v. Irving* have neglected to consider spiritual, family, cultural, and historical ties individual Indians have to their land. Allotment ownership, even when small, represents for many Indians long, unbroken ties to family ancestors and history, to tribal and family identity, and to spiritual and religious responsibilities. Chief Justice *emeritus* Tom Tso of the Navajo Nation Supreme Court has written about the significance of a Navajo individual's ties to a piece of allotted land:

> [Chief Justice Tso] says that the burying of one's umbilical cord on land has "profound significance," signifying a tie to Mother Earth. He states: 'Relocating traditional Navajos from the land where their umbilical cords are buried and where they have always lived is uprooting them from their religion, and from a central part of their own identities. There are no precise analogies in the non-Navajo society of which I am aware to describe the harm that such relocation causes. It would be like yanking an infant away from its mother when the infant is still screaming and the mother is reaching for it, and the mother is killed of loneliness and the child is killed for lack of tenderness and sustenance. It is tantamount to separating the

> Navajo from her spirit.' *United States v. Tsosie*, 849 F. Supp. 768, 774 (D.N.M. 1994).

Recognizing the strong non-economic value that Indian owners place on their land compels recognizing the increased value of their right to pass the land (and the enjoyment of those non-economic values) to their heirs. To many Indian owners of small allotment interests, the tie their ownership maintains to their family, culture, spirituality, and tribe is as important to them as the right to exclude strangers, no matter how small their intrusion or physical occupation, is to owners of land in fee. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). As in *Loretto*, the importance placed upon these ties is historically rooted, in this case stretching back to tribal tradition and common law, to treaties and tribe's allotment statutes which made clear the exchange of allotment for tribal title, see *Resp. Br.* at 18-22, to general federal statutes which assured the right to ownership by landowners' heirs as long as the land remained in trust. 25 U.S.C. 373.

Ignoring the many economic and non-economic benefits of undivided allotment ownership, Petitioner speculates without authority that many, even most, Indians without wills would choose to leave minor fractional interests to the Tribe and assumes that individuals with small interests would not object to their escheat to the tribe. *Pet. Br.* at 29-30, n.13. The experience of *amici* organizations and tribes in Indian Country is completely to the contrary. Even tribes receiving land from Section 207 escheats have opposed the policy: nine of the 11 tribal governments making statements at the Senate Hearings on the 1984 amendments opposed the escheat of small allotment interests without compensation for the owners. None testified in support.[9] *1984 Senate Hearings.*

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[9] Tribes stating their opposition were the Yakima Indian Nation, Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes (Ft. Peck Reservation), Northern Arapaho Tribe, Blackfeet Tribe, Nez Perce Tribe, Oglala Sioux Tribe, Wichita and Affiliated Tribes, Shoshone-Bannock Tribes (Ft. Hall). *1984 Senate Hearings.* Another tribal

Earl Old Person, Chairman of the Blackfeet Tribe, said in a statement:

> The escheat provision has created more anguish among our members than any other piece of federal legislation in recent memory. Our older members do not consider even the small interests in land to be so insignificant that they can just be taken from them. *They consider such interests as part of the invaluable heritage they are to pass on to the next generation.* They see the escheat provision as doing nothing less than cheating them out of their property. *1984 Senate Hearings* at 37, emphasis supplied.

C. Tribal ownership of allotment interests does not provide benefits and use rights equivalent to individual ownership.

Tribal ownership is no substitute for individual ownership, as any non-Indian would say at the prospect of having the government own all property. Once an interest escheats, the income from that interest, regardless of amount or duration, flows to the Tribe, not to the heirs. Rights to use tribal property are determined by the tribe pursuant to its internal political processes, including enforcement of pertinent tribal laws, ordinances, and customs in tribal courts or other forums. *Cohen* at 606; see also *United States v. Chase*, 245 U.S. 89 (1917). The heirs of an escheated allotment interest owner have no right against the tribe to possess, use, or dispose of any portion of the allotment. See *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976). While some tribes might give heirs preference in obtaining use rights to the allotment, they would be under no obligation to do so. Heirs of allotment owners would have no right to exclude other tribal members from use or even damage of allotments that had been in their family for generations. No one would contend that government ownership of non-Indian lands is a suitable alternative to private ownership. Likewise, tribal ownership of allotments is no substitute for individual ownership.

official, representing the Salish and Kootenai Tribes of the Flathead Reservation opposed Section 207 at the 1992 Senate hearings ("These parcels can represent a very spiritual connection to family or to the reservation regardless of size or the value."). *Fractionated Ownership of Indian Lands: Oversight Hearing of the Senate Select Comm. On Indian Affairs*, 102nd Cong., 2d Sess. 41 (1992) *(1992 Hearings)*. Two intertribal organizations, the Indian Land Working Group and the Intertribal Agricultural Council, also opposed Section 207. *Id.* at 27, 144.

Moreover, the fact that property escheats to the tribe under Section 207 in no way compensates for the deprivation of individual ownership. Rights to tribal property are entirely derivative of tribal membership. *Halbert v. United States*, 283 U.S. 753, 762-63 (1931). One who is not a member of the tribe receiving the interest forfeited under Section 207 has no enforceable right to use or benefit from an allotment interest that escheats. Many heirs of allotment owners are not members of the same political-legal tribe as the owner and, as a result, have no rights to use or benefit from their ancestor's allotment after it is transferred. This is particularly common where members of one ethnic-cultural tribe occupy several different, independently recognized, reservations. Intermarriage is common among such political-legal tribes and, consequently, members of one often inherit allotments at another. This is the case among Sioux tribes (16 reservations), Utes (three), Paiutes (four), and Chippewa (19). *Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations* (1996). For one *amicus* tribe, the Oglala Sioux Tribe, almost 20% of the owners of reservation allotments are members of other tribes. *GAO Study* at 24. In the case before the Court, the decedent owned allotment interests on three different reservations, including his own. *Pet. Br.* at 10-11. If Section 207 is upheld, his children will have no right to use or benefit from the land that he willed to them.

A similar but distinct problem occurs among tribes sharing a single reservation. For example, by various treaties, acts and executive orders, members of nine different tribes—Quinault, Quileute, Chehalis, Chinook, Cowlitz, Quit [*sic*], Ozette, Shoalwater and Hoh—were

entitled to allotments on the Quinault Reservation. *Halbert v. United States*, 283 U.S. at 755-762. An appellate court recently refused to overturn the Interior Department's decision that any reservation allotment subject to escheat under Section 207 should go to the Quinault Tribe. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994) Heirs who are members of a tribe other than the one governing the allotment, have no right to share in use of the escheated land, except by gratuity of the governing tribe.

III. THE UNIQUE COMBINATION OF TRUST STATUS AND SECTION 207'S EXTREME REGULATION OF DEVISE RENDERS THE GOVERNMENT'S ACTION EXTRAORDINARY AND HENCE A TAKING.

A. Section 207's character must be evaluated in terms of its practical application.

Petitioner's brief describes allotment owners' right to pass property at death under Section 207 as though the interests were held in fee. *Pet. Br.* 28-31. Of course, this is not the case. Rather, "[a]s long as the title to the land is held in trust, there are drastic restrictions on the alienability of these allotment interests." *Tooahnippah v. Hickel*, 397 U.S. 598, 612 (1970), (Harlan, J., concurring). An Indian allotment owner's right to make *inter vivos* dispositions is limited and requires approval of the Secretary of the Interior. 397 U.S. at 609 (Opinion of the Court). It is inappropriate to evaluate Section 207 as if Indian allotment owners were as free to convey title as owners in fee.

Even the most cherished legal maxims and presumptions must be put to the test of fairness and rationality in light of common experience. As the Court noted in *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925), "[I]n passing on the constitutionality of a state law, its effects must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." Although the land affairs of allotment owners are unlike any "ordinarily conducted" outside Indian Country, applying that principle to the case at bar requires that Section 207 be evaluated in terms of its practical application upon Indian landowners. Because it operates on land titles subject to the Secretary's trust authority, Section 207's impact must be considered in conjunction with the actual exercise of that trust authority, not separate or apart from it. See *Pet. Br.* at 28, n.12. When Section 207 is evaluated in light of the Secretary's trust authority, its impact is much greater and its character much more extraordinary than is otherwise apparent.[10]

B. Section 207's regulation of devise and elimination of descent entirely abolishes the right to pass property for certain classes of allotment landowners.

By statute, the right to devise an allotment interest is limited to persons eighteen years or older. 25 U.S.C. 373. Likewise, only an allotment owner having testamentary capacity can execute a valid will. 43 C.F.R. § 4.260(a). By eliminating the right to pass an allotment through intestacy, Section 207 completely eliminates the right of minors and incompetents lacking testamentary capacity to pass their allotment interests to their heirs at their death. This is true even when descent through intestacy would result in consolidation of the allotment, as when the heir was a co-owner. Members of *amici* organizations and tribes who fall into these classes have no legal mechanism by which to avoid the application of Section 207. For them, the government's action is a "total abrogation" of the right to pass property: it abolishes both descent and devise. See *Hodel v. Irving*, 481 U.S. at 716-717.

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[10] Twelve years after the amendment of Section 207, regulations have yet to be issued. It has been the experience of *amici* organizations and tribes that the BIA has made little effort to notify owners of their potentially escheatable interests and assist them in planning their estates accordingly. Given the Government's trust responsibility towards allotment owners, *United States v. Mitchell*, 463 U.S. 206, 225 (1983), it has an obligation to make reasonable efforts to inform landowners about Section 207 and assist those wishing to avoid its effects.

Similar in effect is Section 207's impact upon heirs affected by the Department of Interior's failure to conduct probate of allotment interests in a timely manner. An heir waiting on an uncompleted probate in order to inherit an allotment interest smaller than 2% [11] is unable to make any *inter vivos* transfers for such interest until the probate is complete. With probates taking three years under the best of circumstances, *1992 Senate Hearings* at 16 (Questioning of Chief Judge, Interior Board of Indian Appeals, by Chairman of Senate Select Committee on Indian Affairs) it would not be unusual for a potential heir to pass away before a probate is complete and thereby never have the right to pass their inherited allotment interest on to their own heirs.

C. The trust status of Indian allotments precludes *inter vivos* transfers from being an adequate substitute for Section 207's extreme limitation of the right of devise.

1. *Inter vivos transfers are no more adequate now as substitutes for the right of devise than they were in* Hodel v. Irving. In *Hodel v. Irving*, Justice O'Connor ruled that although it might be possible for owners of interests to effectively control disposition upon death, such complex *inter vivos* transfers were not an adequate substitute for the rights taken by Section 207. *Hodel v. Irving*, 481 U.S. at 716. The only change since that ruling is that the amended Section 207 now allows a single devise to a co-owner. It is scarcely possible to construct a narrower choice of options. There has been no improvement in the *inter vivos* transfers and there is no reason to think they should now be considered adequate substitutes for the rights taken by Section 207.

2. *The trust status of Indian allotments requires the Secretary of Interior to review all conveyances of allotment title.* The trust status of Indian allotments subjects any conveyance of title to extraordinary regulation, to a

[11] Section 207 prohibits the devise or descent of interests smaller than 2%; it does not prevent an interest of, for example, 5%, from descending to five heirs, 1% each. 25 U.S.C. 2206.

degree unknown in the United States for any other form of property. The Indian Reorganization Act, which extended most trust periods, 25 U.S.C. 462, prohibited the "sale, devise, gift, exchange or other transfer of restricted Indian lands," except in a few limited circumstances. As noted above, this was relaxed slightly by 25 U.S. 483 and other statutes which gave the Secretary discretion to approve conveyances of land or interests in land held in restricted status by individual Indians. See 25 C.F.R. § 152.17. Without secretarial approval, however, a sale or transfer of an allotment interest is void and does not transfer title. 25 U.S.C. 348; *Mottaz v. United States*, 753 F.2d 71, 74 (8th Cir. 1985), reversed on other grounds, 476 U.S. 834 (1986).[12] Because of the trust status of Indian allotments, any efforts by landowners to avoid the effects of Section 207 must be reviewed and approved by the Secretary.

Petitioner acknowledges that all conveyances require Secretarial approval, *Pet. Br.* 28, n.12, but suggests, with no authority, that such approval would be readily granted. The statutes and regulations authorizing approval of allotment conveyances are part of a legislative history which "reflects the concern of the Government to protect Indians from improvident acts or exploitation by others, and [of] comprehensive regulations [which] govern the process of such *inter vivos* dispositions." *Tooahnippah v. Hickel*, 397 U.S. at 609. Since *Tooahnippah*, the statutory scheme has been altered by the Indian Land Consolidation Act (ILCA), which expresses Congressional disfavor of transactions which fail to consolidate fractionated interests.

3. *The Secretary has every incentive and a colorable legal obligation to disapprove inter vivos transfers necessary for allotment owners to avoid escheat.* As discussed earlier, the Secretary believes that the burden

[12] Anyone inducing an Indian to execute an instrument purporting to convey trust land or an interest in trust land or attempting to record such an instrument remains subject to criminal prosecution and penalties under 25 U.S.C. 202.

imposed by fractionated allotments upon the BIA's administrative capacity and budget is significant. To the extent that escheat of a fractionated interest lessens that burden, the Secretary has a substantial incentive not to facilitate or approve *inter vivos* transfers which prevent escheat. This incentive operates upon both the BIA personnel who prepare and process applications for Secretarial approval (and whose direct work load increases with increased fractionation) and those designated to exercise the Secretary's discretion. Action denied or delayed frustrates the purposes of allotment owners who want to avoid forfeit of their interests under Section 207. Given the Indian Land Consolidation Act itself, which expresses a Congressional policy in favor of consolidation, the Secretary is not likely to be prevented from exercising his discretion so as to prevent transfers which fail to consolidate allotment interests.

These opposing pressures on the Secretary may not rise to an actual conflict of interest. They do, however, merit consideration in determining whether Section 207 as amended remains an extraordinary government action. Concerns have been expressed about a tribe's conflict in its receipt of beneficial title to escheated property and its duty to inform property owners about the statute's workings. *Hodel v. Irving*, 481 U.S. at 727 (Stevens, J., concurring). This conflict is exacerbated if the tribe chooses to take over BIA real property functions under PL-638, the Indian Self-Determination Act. 25 U.S.C. 450, *et seq.* In that situation, the tribe is responsible for providing the data upon which escheat would be decided.[13]

The Court noted similar concerns in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980), a case in which county officials "would feel an inherent pressure and possess a natural inclination" to defer distribution of an interest-bearing interpleader account if the interest accrued to the county government. This factor

[13] The Ramah Navajo Chapter, Coeur d'Alene Tribal Council, and the Confederated Tribes of the Umatilla Indian Reservation, among others, have contracted for such authority.

weighed in the Court's decision that retention of the interest was a taking of property requiring payment of just compensation. *Id.* Conflicts among the Secretary's beneficiaries and the difficulties in serving such conflicting interests have been noted before Congress as well. See Reid Chambers, *A Study of Administrative Conflict of Interest in the Protection of Indian Natural Resources, printed by the Subcomm. On Administrative Practice and Procedure of the Senate Comm. On the Judiciary*, 91st Cong., 2d Sess. (1971).

D. The practical application of the requirement for Secretarial approval renders *inter vivos* transfers an inadequate substitute for the right to devise small allotment interests.

Unlike the owner of an interest in fee simple, the owner of a fractionated allotment interest in trust status cannot easily sell, give, or exchange his interest. As an example, the BIA Manual explains in twenty-eight single spaced pages the BIA's process for reviewing and approving sale of an allotment interest. 54 BIAM 2.2. It requires the filing of five to ten BIA forms depending on whether a sale is negotiated or bid, whether it includes water rights, and whether the purchaser is the tribe or an individual. Of these, at least four are prepared not by the landowner, but solely by the BIA. 54 BIAM 2.2.3.I (1)-(10). All must be approved by the BIA Agency Superintendent and then the Area Director as in the long range best interest of the landowner. 54 BIAM 8.2.1.B. Although the title conveyance process may work on paper, in practice members of *amici* organizations and tribes have found the process of obtaining Secretarial approval for a sale, gift deed, exchange or other transfer extraordinarily slow and laborious.[14] Procedures for partitions and leasing are

[14] According to the BIA Manual, a successful sale requires completion of the following steps: (1) An owner or owners wishing to sell property must submit to the BIA Agency Superintendent an Application for Sale of Land, Form 5-105. Unless one of the owners is found incompetent, all must agree to the sale. 25 C.F.R. 152.17; 54 BIAM 2.2.3.H(1)(a). According to the BIAM, undi-

similar, if not more complicated. According to testimony at 1992 Senate oversight hearings, making an approved gift deed for forested lands then took at least four to six years. *1992 Senate Hearing* (1992) (Testimony of Quinault Reservation allotment owner Helen Saunders).

Petitioner argues that a revocable trust is available to allotment owners wishing to transfer small interests to their heirs at death. *Pet. Br.* at 28-29. This option was expressly rejected by the Court in *Hodel v. Irving* as a suitable substitute for devise and descent, 481 U.S. at 716, and is no more satisfactory here. A person only has capacity to make a trust to the extent that they have capacity to transfer the property *inter vivos*. *Restatement (Second) of Trusts*, § 18 (1959). A revocable trust, like any other conveyance, would require secretarial approval. Petitioner's Brief does not discuss the implications of restraints on alienation upon the permissibility of a revocable trust nor does it offer any authority that such trusts have ever been tried for allotments, let alone approved by the Secretary.

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vided interests may be sold only to other owners of the land or the tribe, but the Code of Federal Regulations indicates that the Secretary can approve acquisition (and presumably sale) of fractional interests if the buyer is a co-owner, offers to buy all the remaining interests for fair market value, or has a majority of the ownership consent to the acquisition. 25 C.F.R. 151.7. (2) A Title Status Report with abstract of heirship must be obtained and it must be determined that title to the property can be conveyed. (3) The Agency Superintendent must determine and reduce to writing his judgment that the sale is in the long term best interests of the landowner. (4) An appraisal must be requested and made (Form 5-100-A), usually by the BIA. (5) Notice must be given to the tribe to allow it to negotiate purchase of whatever interest is being sold. (6) An instrument of conveyance must be prepared by the BIA and executed by the seller. (7) Instructions must be given to the Bureau of Land Management regarding any reservations and conditions which are to be included in the deed. (8) When applicable, an irrigation statement and water contract must be submitted, as must a resolution of the tribal governing body if it is the purchaser of the allotment interest. (9) All required documents must be approved by the Area Superintendent and submitted to the Area Director for final approval. 54 BIAM 2.2.3.

A similar testamentary device, a general power of appointment, was held by the Interior Department to usurp secretarial power. *Estate of Daniel J. Pierre*, 6 IBIA 17 (1977). An Interior Department Administrative Law Judge held a testamentary trust invalid for allotment interests and noted that the Department's Solicitor has routinely advised the BIA to withhold approval of trust agreements covering trust land. *Estate of Joseph Emerson*, Salt River Allottee No. 192, Probate No. IP PH 66I93, decided 2-26-93. The BIA itself did not list the option of a revocable trust in its instructions to area directors on how allotment owners can avoid escheat. *Hodel v. Irving*, 481 U.S. at 722, n.6 (Stevens, J., concurring). Nor is the possibility mentioned in regulations providing for sales, exchanges, and other conveyances of individually owned Indian land, 25 C.F.R. 152.17, 152.25. Revocable trusts are excluded from any mention in the Department of Interior's Will Drafting Manual discussion of "*Inter vivos* Responses to Fractionation." 54 BIAM Supp. 8, at 26. As far as *amici* can determine, there are no procedures, regulations, nor practices for the establishment of revocable trusts by BIA personnel nor for their approval by the Secretary. At best, a revocable trust, like any other conveyance, would be subject to secretarial approval. Given the burdens of obtaining such approval, it, like other means of transfer, remains an inadequate substitute for the right to devise.[15]

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[15] Justice Stevens, concurring in *Hodel v. Irving*, wrote that a statute calling for escheat of private property cannot impose conditions on continued ownership that are unreasonable, either because they cost too much or because the statute does not allow owners a reasonable opportunity to avoid the loss of their property. In *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), the property owners had to do no more than file a claim once every twenty years. They had to rely on no government bureaucracy for discretionary approval and had to comply with no onerous procedures to avoid loss of their property. The same is not true of Section 207.

IV. THE GOVERNMENT HAS VARIOUS CONSTITUTIONAL OPTIONS AVAILABLE TO ADDRESS PROBLEMS OF FRACTIONATED ALLOTMENT OWNERSHIP.

The Court should not evaluate Section 207 as if Congress had acted to comply with the Court's ruling in *Hodel v. Irving*. Section 207 was amended in 1984, three years before *Hodel* was decided. 25 U.S.C.A. 2206. Since that ruling, Congress has taken no further action to address fractionated ownership. There are, however, options available which would not constitute a taking of property without just compensation.

As noted in *Hodel v. Irving*, the Government has several constitutional options in addressing allotment problems. Most simply, it could pay just compensation to the affected allotment owners or their estates. It could assist tribes and individuals to purchase and consolidate small fractionated interests. It could even place *reasonable* conditions upon their devise or descent. *Hodel v. Irving*, 481 U.S. at 719, J. Stevens, concurring (emphasis supplied). Other constitutional options the Government could pursue include, but are not limited to, facilitating consolidation of fractionated interests by individuals and families and promoting estate planning by allotment owners. Some components of these options would require the expenditure of government funds—not an unreasonable requirement given the origins of the fractionation problem —while others require only a change in law or administrative interpretation.

Consolidation by individual and families could be promoted without the expenditure of government funds by simplifying the rules governing sales and other conveyances. In particular, rules requiring appraisals in most sales and exchanges of fractionated interests, 25 C.F.R. 152.25, result in unnecessary expense and delay and frequently prevent consummation of land conveyances. Current regulations prohibit a non-owner, even one who owns contiguously and is a member of the owner's tribe or family, from purchasing a fractionated allotment interest without offering to purchase the entire allotment

or receiving the consent of more than half of the allotment ownership. 25 C.F.R. 151.7. This precludes individual tribal members from consolidating fractionated ownership by purchase over time. Consolidation could also be accomplished through the establishment and promotion of mechanisms for joint family ownership such as family trusts or cooperative associations.

A key element in a plan to consolidate ownership in families and individuals (as well as for effective estate planning and tribal consolidation) is providing ready access to complete and accurate land ownership information. In order to facilitate sales, gifts, exchanges, and other conveyances which consolidate title, landowners need to be able to find out who their co-owners are in a particular allotment, what other allotment interests those co-owners have, and who owns other parcels of land in the area. *1992 Senate Hearings* at 160 (Response of Indian Land Working Group to GAO Study). They also need access to information about resources and values of allotted lands. Such information is not now readily available to allotment owners, their families, or even tribal governments.[16] *Ibid.* at 25, 49.

The Government could also assist tribes and individuals in consolidating ownership by purchase. The first obstacle, of course, is funds. The Government could establish revolving loan funds which could be replenished by proceeds from allotment interests. Changes in regulations, however, would also facilitate consolidation. The prohibition against partial purchase of a fractionated allotment cited above, 25 C.F.R. 151.7, also applies to tribes and, as a result, if a tribe does not own a portion of an allotment it cannot acquire fractionated interests a little at a time. A tribe must purchase the entire allotment (and obtain consent of the ownership). The Government

[16] Although the BIA indicates that policy is otherwise, some BIA offices refuse to provide ownership information to co-owners based upon an incorrect interpretation of the Privacy Act. *1992 Hearings* at 18-19 (Response of Interior Department that Privacy Act only limits access to economic information about owners and certain probate records).

could also facilitate the establishment of Tribal Land Enterprises in which owners of fractionated allotment interests exchange those interests for ownership shares in individual land assignments from the tribal enterprise. A successful model for this approach has been demonstrated by the Rosebud Sioux Indian Tribe, *1992 Hearings* at 209 (Testimony of Ben Black Bear), but use by other tribes would require funding and technical expertise and assistance.

Finally, the Government could place *reasonable* conditions upon the devise and descent of fractionated interests. It might be reasonable to limit the number of heirs who could inherit a fractionated interest or to require such interests to descend as joint tenancies with right of survivorship. It would be reasonable to require heirs inheriting an interest to designate a single heir or beneficiary for that interest. What is not reasonable is for the Government to eliminate the only practical means landowners have to pass property to their chosen heirs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOEL JASPERSE
Counsel of Record
509 Zecca Drive
Gallup, NM 87301
(505) 722-4417

LEVON B. HENRY
NAVAJO LANDOWNERS RIGHTS PROJECT, INC.
P.O. Box 2104
Crownpoint, NM 87313
(505) 786-7207

KENNETH BOBROFF
DNA-PEOPLE'S LEGAL SERVICES, INC.
P.O. Box 116
Crownpoint, NM 87313
(505) 786-5277

THOMAS E. LUEBBEN
LAW OFFICE OF
THOMAS E. LUEBBEN
211 12th Street NW
Albuquerque, NM 87102
(505) 842-8128
Counsel for San Xavier District Council, San Xavier Allottees Association, and San Xavier Cooperative Association